SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

NO. 22.

BERNARD B. HANS, PLAINTIFF IN ERROR,

versus

THE STATE OF LOUISIANA.

In error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF FOR PLAINTIFF IN ERROR.

J. D. ROUSE,
WILLIAM GRANT,
Attorneys for Plaintiff.

New Orleans, La., October, 1888.

L. GRAHAM & SON, PRINTERS, 101 GRAVIER ST., N. O.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

NO. 22.

BERNARD B. HANS, PLAINTIFF IN ERROR,

versus

THE STATE OF LOUISIANA.

In error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

By act No. 3, approved January 24, 1874, the legislature of Louisiana made provision for refunding the debt of the State, and for that purpose authorized the issue of bonds to the amount of fifteen millions of dollars, payable forty years from the first day of January, 1874, bearing interest at the rate of seven per cent. per annum, payable semi-annually, coupons for such interest to be annexed to the bonds, and said bonds to be known as "consolidated bonds of the State of Louisiana."

By section 7 of said act an annual tax of five and one

half mills was levied upon the assessed value of all the real and personal property in the State for the purpose of paying the interest and principal of said consolidated bonds, and the revenue to be derived therefrom was "set apart and appropriated to that purpose, and no other; such tax and appropriation to continue annually until said bonds and interest shall be paid or redeemed.

By section 11 it was enacted: "That each provision of this act shall be and is hereby declared to be a contract between the State of Louisiana and each and every holder of the bonds issued under this act."

The act also contained stringent and highly penal provisions, intended to enforce its execution by the officers of the State and for the protection of the bondholder against any impairment of his rights. A copy of the act is printed at the end of this brief.

In aid of its refunding scheme the same legislature, by act No. 4, proposed the following amendment to the constitution of the State, viz.:

"No. 1. The issue of consolidated bonds, authorized by the general assembly of the State at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the tax therefor. *To secure such levy, collection and payment the judicial power shall be exercised when necessary.* The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the State to the holders of said bonds

as the principal and interest of the same shall fall due; and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the treasury." La. Acts, 1874, p. 42.

This amendment was duly adopted and became a part of the organic law of the State in November, 1874.

With these guarantees the State succeeded in refunding the greater portion of its debt, at a reduction of forty per cent., into such consolidated bonds.

In December, 1879, a new constitution for the State of Louisiana was adopted, containing the following:

"Art. 257. The constitution of this State, adopted in 1868, *and all amendments thereto*, is declared to be superseded by this constitution." * * *

There was at the same time separately submitted and adopted as a part of said constitution what is commonly called the "debt ordinance," containing provisions for the partial repudiation ofthe consolidated bonds of the State, one of which articles is as follows:

"Art. 3. *Be it further ordained*, That the coupon of said consolidated bonds falling due the first of January, 1880, be and the same is hereby remitted, and any inter est taxes collected to meet said coupon are hereby transferred to defray the expenses of the State government."

The plaintiff, *a citizen of the State of Louisiana*, brought this action in the court below against said State, alleging himself to be the holder and owner of three thousand coupons, representing the interest to the amount of $87,500 upon consolidated bonds of said State, issued under the act of January 24, 1874, accrued during the last six months of 1879 and falling due January 1st, 1880; setting up the contract obligation of the State under said act, and its sanction by said constitutional amendment, and alleging the repudiation thereof by the constitutional pro-

visions of 1879, and consequent refusal of the State to pay the coupons held by the plaintiff.

He also averred that taxes for the payment of the interest upon said bonds due January 1st, 1880, were levied and collected, but said State unlawfully and wrongfully diverted the money so collected, and appropriated the same to payment of the general expenses of the State, and made no other provision for the payment of said interest.

He averred "that said provisions of said constitution are in contravention of said contract, and their adoption was an active violation thereof; and that said State thereby sought to impair the obligation thereof with your petitioner, in violation of article 1, section 10 of the constitution of the United States and the effect so given to said State constitution does impair said contract."

He concludes with a prayer for judgment against the State for the amount of his coupons, with interest thereon from their maturity, and costs of suit. Petition, R., p. 1.

After service of process the State appeared and excepted to the jurisdiction of the court, as follows:

"Now comes defendant, by the attorney-general, and excepts to plaintiff's suit on the ground that this court is without jurisdiction *ratione personæ*. Plaintiff cannot sue the State without its permission; the constitution and laws do not give this honorable court jurisdiction of a suit against the State, and its jurisdiction is respectfully declined." R., p. 4.

This exception was maintained, the suit dismissed, and the plaintiff sued out this writ of error (R. pp., 4–5), and now

ASSIGNS AS ERROR,

said judgment denying the jurisdiction of said circuit court and dismissing the action.

ARGUMENT

I.

The case presented is an action at law upon a contract obligation—a money demand—brought in a circuit court of the United States *by a citizen of the State of Louisiana* against the State itself.

The jurisdiction was invoked because said State having impaired the obligation of its contract with the plaintiff, in violation of the prohibition of the constitution of the United States, the case is one arising under that constitution.

The sole question arising in this case, and now here presented for the first time, is: "Does the judicial power of the United States extend to a case arising under the constitution or laws of the United States and originally brought against a State by one of its own citizens?"

The judicial power of the United States is established by the constitution, and its extent is defined by section 2 of article 3, which is as follows:

"The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority; to all cases affecting embassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects."

The provision is mandatory, and has always been held to include all that the fullest scope given to the language requires.

In *Osborne vs. Bank of U. S.*, 9 Wheat. 738, Chief Justice MARSHALL said: "This clause of the constitution enables the judicial department to receive jurisdiction to the fullest extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it."

Mr. Justice STORY says: "A case is a suit in law or equity instituted according to the regular course of judicial proceedings; and when it involves any question arising under the constitution, laws or treaties of the United States, it is within the judicial power confided to the Union." Story's Constitution, sec. 1646.

Says Chief Justice MARSHALL: "A case in law or equity consists of the right of the one party as well as of the other, and may be truly said to arise under the constitution or a law of the United States whenever its correct decision depends on the construction of either." *Cohen vs. Virginia*, 6 Wheat. 264. This is the settled law of this court. *Osborne vs. Bank, supra; Tennessee vs. Davis*, 100 U. S. 257; *Railroad Company vs. Mississippi*, 102 U. S. 135; *The Mayor vs. Cooper*, 6 Wall. 247.

In the case last cited the court said: "It is the right and duty of the national government to have its constitution and laws interpreted and applied by its own judicial tribunals. In cases arising under them, properly brought before them, this court is the final arbiter. The decisions of the courts of the United States, within their sphere of action, are as conclusive as the laws of congress made in pursuance of the constitution. This is essential to the peace of the nation and to the vigor and efficiency of the government. A different principle would lead to the most mischievous consequences. The courts of the several States might determine the same question in different ways. There would be no uniformity of decisions."

So Cooley, at page 12 of his work, says: "The constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are declared to be the supreme law of the land; and the judges of every State are to be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. It is essential to the protection of the national jurisdiction and to prevent collision between State and national authority that the final decision upon all questions arising in regard thereto should rest with the courts of the Union."

So, in the case of *Cohen vs. Virginia*, *supra*, Chief Justice MARSHALL declares that "this jurisdiction is dependent upon the subject-matter, and where a case arises under the constitution and laws of the United States the judicial power extends to it, whoever may be the parties."

So also said Webster in his second speech on the Foot's resolution:

"The people then, sir, erected this government. They gave it a constitution, and in that constitution they have enumerated the powers which they bestow on it. They have made it a limited government. They have defined its authority. They have restrained it to the exercise of such powers as are granted, and all others they declare are reserved to the States or the people. But, sir, they have not stopped here. If they had they would have accomplished but half their work. No definition can be so clear as to avoid possibility of doubt; no limitation so precise as to exclude all uncertainty. Who, then, shall construe this grant of the people? Who shall interpret their will where it may be supposed they have left it doubtful? With whom do they repose this ultimate right of deciding on the power of the government? Sir, they have settled all this in the fullest manner. They have left it

with the government itself in its appropriate branches Sir, the very chief end, the main design for which the whole constitution was framed and adopted, was to establish a government that should not be obliged to act through State agency, or depend on State opinion and State discretion. The people had had quite enough of that kind of government under the confederation. Under that system the legal action, the application of law to individuals, belonged exclusively to the State. Congress could only recommend; their acts were not of binding force till the States had ratified and sanctioned them. Are we in that condition still? Are we yet at the mercy of State discretion and State construction? Sir, if we are, then vain will be our attempt to maintain the constitution under which we sit. But, sir, the people have wisely provided in the constitution itself a proper, suitable mode and tribunal for settling questions of constitutional law. There are in the constitution grants of power to congress and restriction on these powers. There are also prohibitions on the States. Some authority must, therefore, necessarily exist, having the ultimate jurisdiction to fix and ascertain the interpretation of these grants, restrictions and prohibitions. The constitution has itself pointed out, ordained and established that authority. How has it accomplished this great and essential end? By declaring, sir, that the constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. This, sir, was the first great step. By this the supremacy of the constitution and laws of the United States is declared. The people so will it. No State law is to be valid which comes in conflict with the constitution or any law of the United States passed in pursuance of it. But who shall decide this question of interference? To

whom lies the last appeal? This, sir, the constitution itself decides also by declaring that the judicial power shall extend to all cases arising under the constitution and laws of the United States. These two provisions cover the whole ground. They are in truth the keystone of the arch. With these it is a government; without them it is a confederation. In pursuance of these clear and express provisions congress established, at its very first session, in the judicial act, a mode for carrying them into full effect—for bringing all questions of constitutional power to the final decision of the Supreme Court. It then, sir, became a government." *Webster's Works*, vol. 3, p. 334.

Again, in his argument before the senate of the United States, on the question whether the constitution was a compact between the sovereign States, he said:

"And in regard, sir, to the judiciary, the constitution is still more express and emphatic. It declares that the judicial power shall extend to all cases in law or equity arising under the constitution, laws of the United States and treaties; that there shall be one supreme court, and that this supreme court shall have appellate jurisdiction of all these cases, subject to such exceptions as congress may make. It is impossible to escape from the generality of these words. If a case arises under the constitution—that is, if a case arises depending on the construction of the constitution—the judicial power of the United States extends to it. It reaches the case—the question; it attaches the power of the national judicature to the case itself, in whatever court it may arise or exist, and in this case the Supreme Court has appellate jurisdiction over all courts whatever. No language could provide with more effect and precision than is here done for subjecting constitutional questions to the ultimate decision of the Supreme Court. And, sir, this is exactly what the convention found it ne-

cessary to provide for, and intended to provide for." *Ibid.*, vol. 3, p. 482.

II.

But it is contended by the defendant that because of its sovereignty it is excepted from the operation of this general grant of judicial power.

There is no warrant for the proposition either in the history of the constitution or in its judicial interpretation.

The sovereignty of the States is limited by the constitution. No State can enter into any treaty, alliance or confederation; grant letters of marque, pass any bill of attainder, or grant any title of nobility. These and many other rights and powers inherent in sovereign States were surrendered to the federal government by the adoption of the constitution.

Sovereign States may not be sued without their consent, but by the federal constitution the States submitted themselves to the judicial power of the Uuion in many named cases. It was expressly extended to controversies between two or more States; between a State and citizens of another State, and between a State and foreign States, citizens or subjects.

This was necessary for the establishnment of justice, and to insure that domestic tranquility among the chief objects of the constitution, because controversies would inevitably arise between the States themselves, as well as between the States and citizens of sister or foreign States, which might not involve any question arising under the constitution or laws of the United States, jurisdiction over which had already been given in all cases, without regard to parties, whether States or individuals.

In *Chisholm vs. Georgia*, 2 Dallas 419, a citizen of South Carolina sued the State of Georgia, invoking jurisdiction under that clause of the constitution extending the

judicial power to controversies between States and citizens of other States. It was contended on behalf of the State of Georgia that while a State might sue a citizen of another State in the federal courts, the State could not there be sued.

Chief Justice JAY, in his opinion therein, at page 476, said:

"The question now before us renders it necessary to pay particular attention to the second section, which extends the judicial power 'to controversies between a State and citizens of another State.' It is contended that this ought to be construed to reach none of these controversies excepting those in which a State may be plaintiff. The ordinary rules for construction will easily decide whether these words are to be understood in that limited sense. This extension of the power is remedial, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise and good that not only the controversies in which a State is plaintiff, but also those in which a State is defendant, should be settled. Both cases, therefore, are within the reason of the remedy, and ought to be so adjudged unless the obvious, plain and literal sense of the words forbid it. If we attend to the *words* we find them to be express, positive, free from ambiguity and without room for such implied expressions. The judicial power of the United States shall extend to controversies between a State and citizens of another State.' If the constitution really meant to extend these powers only to those controversies in which a State might be plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words not only so incompetent, but also repugnant to it. If it meant to exclude a certain class of these controversies why were

they not expressly excepted ? On the contrary, not even an intimation of such intention appears in any part of the constitution. It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no *controversy* between them. If it is a *controversy* between them then it clearly falls not only within the spirit, but the very words of the constitution. What is it to the cause of justice and how can it affect the definition of the word '*controversy*' whether the demands which cause the dispute are made by a State against citizens of another State, or by the latter against the former. When power is thus extended to a '*controversy*' it necessarily, as to all judicial purposes, is also extended to those between whom it subsists.

"The exception contended for would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is to insure justice to all—to the few against the many, as well as to the many against the few. It would be strange indeed that the joint and equal sovereigns of this country should, in the very constitution by which they professed to establish justice, so far deviate from the true path of equality and impartiality as to give the collective citizens of one State the right of suing individual citizens of another State, and yet deny those citizens a right of suing them. We find the same general and comprehensive manner of expressing the same ideas in a subsequent clause, in which the constitution ordains that in all cases affecting embassadors, other public ministers and consuls, *and those in which a State shall be a party*, the Supreme Court shall have original jurisdiction. Did it mean here party plaintiff? If that *only* was meant it would have been easy to find words to express it. Words are to be understood in their ordinary and common acceptation, and the word '*party*'

being in common usage applicable both to *plaintiff* and *defendant*, we cannot limit it to one of them in the present case. We find the legislature of the United States expressing themselves in the like general and comprehensive manner. They speak in the thirteenth section of the judicial act of controversies where a State is a *party*, and as they do not impliedly or expressly apply that term to either of the litigants in particular we are to understand them as speaking of *both*. In the same section they distinguish the cases where embassadors are plaintiffs from those in which embassadors are defendants, and make different provisions respecting those cases; and it is not unnatural to suppose that they would in like manner have distinguished between the cases where a State was plaintiff and where a State was defendant if they had intended to make any difference between them, or if they had apprehended that the constitution had made any difference between them."

So Mr. Justice WILSON in the same case, after affirming the jurisdiction, upon fair and legitimate deduction from the constitution, said:

"But in my opinion this doctrine rests not only upon the legitimate result of fair and conclusive deduction from the constitution. It is confirmed beyond all doubt by the direct and explicit declaration of the constitution itself. The judicial power of the United States shall extend to controversies between the States. Two States are supposed to have a controversy between them. This controvery is supposed to be brought before those vested with the judicial power of the United States. Can the most consummate degree of professional ingenuity devise a mode by which this controversy between two States can be brought before a court of law and yet neither of those States be a defendant? The judicial power of the United

States shall extend to controversies between a State and citizens of another State. Could the strictest legal language—could even that language which is peculiarly appropriated to an act, deemed by a great master to be one of the most honorable, laudable and profitable things in our law—could this strict and appropriated language decide with more precise accuracy the cause now depending before this tribunal? Causes, and not parties to causes, are weighed by Justice in her equal scales. On the former solely her attention is fixed. To the latter she is, as she is painted, blind." P. 466.

III.

This decision was followed by the adoption of the eleventh amendment to the constitution, declaring:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

This is a limitation upon the exercise of judicial power in the cases named. Upon no principle of construction can the limitation be applied to other cases. No change in the constitution was made in any other respect. The judicial power still extends to all cases over which it was granted, excepting only suits in law or equity commenced or prosecuted *against* a State by a citizen of another State or of a foreign State. Suits may still be brought by a foreign State against a State of the Union, by one State against another or against the citizens of another State. *Wisconsin vs. Pelican Ins. Co.*, 127 U. S. 265.

The jurisdiction has been exercised in cases too numerous to mention.

In *Rhode Island vs. Massachusetts*, 12 Pet. 677, it is said: "This court, in construing the constitution as to the grants

of powers to the United States and the restrictions upon the States has ever held that an exception of any particular case presupposes that those which are not excepted are embraced within the grant or prohibition, and has laid it down as a general rule that when no exception is made in terms, none will be made by mere implication or construction." Page 722, citing 6 Wheat. 378; 8 Wh. 489, 490; 12 Wh. 438; 9 Wh. 206, 207, 216.

By the adoption of the constitution the States surrendered their sovereign right to exemption from suit, and submitted themselves to the judicial power of the United States in all cases to which it extends. "All the rights of the States as independent nations were surrendered to the United States." *New Hampshire vs. Louisiana*, 108 U. S. 90.

"The States waived their exemption from judicial power, as sovereigns, by original and inherent right, by their own grant of its exercise over themselves in such cases." *Rhode Island vs. Massachusetts*, *supra*, p. 719.

"If, whenever or wherever a case arises under the constitution and laws or treaties of the United States, the national government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is at least temporarily silenced instead of being at all times supreme." *Tennessee vs. Davis*, 100 U. S. 266.

"The constitutional power is given in general terms. No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced." *Ibid.*, p. 270; *The Mayor vs. Cooper*, *supra*, 247.

This court has ever been careful to confine the effect of the eleventh amendment to the cases named therein.

In *Poindexter vs. Greenhow*, 114 U. S. 270, it was contended that the suit was one against the State, and there-

fore forbidden by the eleventh amendment to the constitution, To which this court replied:

"This immunity from suit, secured to the States, is undoubtedly a part of the constitution, of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. That immunity, however, does not exempt the State from the operation of the constitutional provision that no State shall pass any law impairing the obligation of contracts; for it has long been settled that contracts between a State and an individual are as fully protected by the constitution as contracts between two individuals. It is true, that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open under the constitution, in the courts of the United States, by a direct suit against the State itself, on the part of the injured partly, *being a citizen of another State or a citizen or subject of a foreign State.* But it is equally true that whenever, in a controversy between parties to a suit, of which these courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences to the rights of the litigants may be the result of the determination. The cases establishing these propositions, which have been decided by this court since the adoption of the eleventh amendment to the constitution, are numerous." P. 286.

Again, in the same case, this court said:

"The thing prohibited by the eleventh amendment is the exercise of jurisdiction in a suit, in law or equity, commenced or prosecuted against one of the United States *by citizens of another State, or by citizens or subjects of any*

foreign State. Nothing else is touched. * * * The immunity from suit now invoked by the State vainly to protect the individual wrongdoers finds no warrant in the eleventh amendment to the constitution, and is in fact a protest against that other provision which forbids any State from passing laws impairing the obligation of contracts. To accomplish this result requires a new amendment which would not forbid any State from passing laws impairing the obligation of its own contracts." P. 297.

This is in accord with the principle laid down in *Chisholm vs. Georgia, supra*, by Mr. Justice WILSON (p. 465), where he said:

"Another declared object [of the constitution] is to establish justice. This points in a particular manner to the judicial authority. And when we view this object in conjunction with the declaration 'that no State shall pass a law impairing the obligation of contracts,' we shall probably think that this object points in a particular manner *to the jurisdiction of the court over the several States.* What good purpose could this constitutional provision *secure* if a State might pass a law impairing the obligation of *its own* contracts, and be amenable for such a violation of right to no controlling power?"

And Chief Justice JAY, p. 479:

"The extension of the judiciary power of the United States to such controversies appears to be *wise*, because it is *honest* and because it is *useful*. It is *honest* because it provides for doing justice without respect to persons; and by securing individual citizens, as well as States, in their respective rights, performs the promise which every government makes to every free citizen of equal justice and protection. It is *useful* because it is honest; because it leaves not even the most obscure and friendless citizen

without means of obtaining justice from a neighboring State; because it obviates the occasions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests upon this great moral truth, that justice is the same whether due from one man or from a million; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every one of them to obtain justice without any danger of being overborne with the might and number of their opponents; and because it brings into action and enforces the great and glorious principle that the people are the sovereigns of this country, and consequently that fellow-citizens and joint-sovereings cannot be degraded by appearing with each other in their own courts to have their controversies determined."

In *New Hampshire vs. Louisiana*, *supra*, the Chief Justice said: "The evident purpose of the amendment so promptly proposed and finally adopted was to prohibit all suits against a State by or for *citizens of other States or aliens* without the consent of the State to be sued." P. 91.

In re Ayres, 128 U. S. 443, the contempt proceedings were in a suit instituted by aliens, and therefore held not to be within the jurisdiction of the court, because of the eleventh amendment. P. 502, 507.

The cases of *Haygood vs. Southern*, 117 U. S. 52, and *Louisiana vs. Jumel*, 107 U. S. 711, were held to be in effect suits against a State within the prohibition of the amendment, the plaintiffs being citizens of another State.

In the last named case the complainants were citizens of New York, and this court said:

"The bonds and coupons which the parties to these suits hold have not been reduced to judgment, and there is no way in which the State, in its capacity as an organized

political community, can be brought before any court of the State or of the United States to answer a suit in the name of *these holders* to obtain such a judgment.

"It was expressly decided by the Supreme Court of the State in *State ex rel. Hart vs. Burke*, 33 La. Ann. 498, that such a suit could not be brought in the State court, and under the eleventh amendment to the constitution no State can be sued in the courts of the United States by a *citizen of another State*." P. 720.

That the judicial power extends to all cases arising under the constitution or laws of the United States, even where a State is a party, was affirmed by this court in *Cohen vs. Virginia*, 6 Wheat. 279.

Chief Justice MARSHALL, in delivering the opinion of the court in that case, said:

"The first question to be considered is whether the jurisdiction of this court is excluded by the character of the parties, one of them being a State and the other a citizen of that State. The judicial power," he said, "is authorized to decide all cases of every description arising under the constitution or laws of the United States. From this general grant of jurisdiction no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State in relation to each other, the nature of our constitution, the subordination of the State government, the subordination of the State government to that constitution, the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the con-

stitution or laws of the United States is cognizable in the courts of the Union, *whoever may be the parties.*" P.

Again he said:

"It has been also urged, as an additional objection to the jurisdiction of this court, that cases between a State and its own citizens do not come within the general scope of the constitution, and were obviously never intended to be made cognizable in the federal courts. * * * * If jurisdiction depended entirely on the character of the parties, and was not given when the parties have not an original right to come into court, that part of the second section of the third article, which extends the judicial power to all cases arising under the constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction where the character of the parties could not give it that this very important part of the clause was inserted.

"It may be true that the partiality of the State tribunals, in ordinary controversies between a State and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important and much more interesting object was the preservation of the constitution and laws of the United States so far as they can be preserved by judicial authority; and therefore the jurisdiction of the courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision

which expressly extends the judicial power of the Union to *all* cases arising under the constitution and laws? After bestowing on this subject the most attentive consideration the court can perceive no reason, founded on the character of the parties, for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising nnder the constitution or a law of the United States, *whoever may be the parties.*" Pp. 391, 392.

In that case it was contendcd that the court was prohibited from exercising jurisdiction by the eleventh amendment to the constitution, but the court denied the claim,

The constitution, in article 3, section 1, declares that the judicial power shall be vested in one supreme court and in such inferior courts as congress may from time to time ordain or establish. That is mandatory. It did not leave it to the discretion of congress. For a long time this power in cases arising under the laws and constitution of the United States was vested in the Supreme Court alone, but by the act of March 3, 1875, congress extended jurisdiction to the circuit courts in all cases arising under the constitution and laws of the United States, which are of a civil nature, when the amount or value in dispute exceeds $500.

In *Ames vs. Kansas*, 111 U. S. 449, the State, after the act of March 3, 1875, brought a suit against a corporation of her own creation, in one of her own courts, and denied the jurisdiction of the Circuit Court of the United States when the case was removed to that court. The defendant having set up its acceptance of the provisions of an act of congress by which it became a part of the Union Pacific Railway, incorporated by an act of congress, sought and

obtained a removal of the cause to the circuit court on the ground that the case presented a controversy arising under a law of the United States. The State denied the jurisdiction of the circuit court, because the State was a party, and declined to assent thereto, and moved to remand the cause to the State court whence removed.

In reviewing the judgment of the circuit court remanding the case Chief Justice WAITE, as the organ of the court, said:

"The only question we have to consider is, therefore, whether suits cognizable in the courts of the United States, on account of the nature of the controversy, and which need not be brought originally in the Supreme Court, may now be brought in or removed to the circuit court without regard to the character of the parties. All admit that the act of March 3, 1875, does give the requisite jurisdiction in suits where a State is not a party, so that the real question is whether the constitution exempts the States from its operation." P. 470.

Again, after quoting from Chief Justice MARSHALL, in *Cohen vs. Virginia* (as we have *supra*), he said: "The language of the act of 1875 in this particular is identical with that of the constitution, and the evident purpose of congress was to make the original jurisdiction of the circuit courts co-extensive with the judicial power in all cases where the Supreme Court had not already been invested by law with exclusive cognizance." To quote again from Chief Justice MARSHALL, in the case of *Cohen vs. Virginia*, p. 379, "the jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this kind from that jurisdiction must sustain the exemption they claim, on the spirit and true meaning

of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed. This rule is equally applicable to the statute we have now under consideration. The judicial power of the United States extends to *all* cases arising under the constitution and laws, and the act of 1875 commits the exercise of that power to the circuit courts."

The jurisdiction in such cases is also expressly asserted in *Carter vs. Greenhow*, 114 U. S. 322; the *Civil Rights Cases*, 109 U. S. 12; *Norfolk Trust Co. vs. Marye*, 25 Fed. Rep. 654; and *Harvey vs. Com. of Virginia*, 20 Fed. Rep., note, p. 417.

IV.

The third article of the constitution declares that "the judicial power of the United States shall be vested in one supreme court and in such other inferior courts as the congress may from time to time ordain and establish."

The language of this article is mandatory upon the legislature. "The whole judicial power of the United States should be at all times vested either in original or appellate form, in some courts created under its (congress') authority." *Martin vs. Hunter's Lessee*, 1 Wheat. 334.

This article also declares that "in all cases * * * * in which a State shall be a party the Supreme Court shall have original jurisdiction."

By the judiciary act of 1789, sec. 13, it is enacted that "the Supreme Court shall have *exclusive* jurisdiction of controversies of a civil nature where a State is a party, *except between a State and its citizens;* and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction" (1 Stat. 80); thus clearly recognizing that controversies might arise between a State and its citizens within the judicial power of the United States.

In *Ames vs. Kansas, supra*, it was held that the jurisdiction of this court is not *exclusive* except in the cases where it is made so by the judiciary act, but that congress is competent to vest jurisdiction in such cases in the circuit courts, and has done so by the act of March 3, 1875 (18 Stat. 470), "in all cases where the Supreme Court had not already been invested by law with exclusive cognizance." (P. 471.) In that case the State of Kansas was a party, and notwithstanding its strenuous opposition the jurisdiction of the circuit court was maintained.

The constitution is the supreme law of the land, and upon its adoption the sovereignty of the States ceased to exist as to all matters confided to the federal government.

As this court said in *Dodge vs. Woolsey*, 18 How. 331:

"But it is not only over the departments of the government that the constitution is supreme. It is so, to the extent of its delegated power, *over all* who made themselves parties to it—*States* as well as persons—within those concessions of sovereign powers yielded by the people of the States when they accepted the constitution in their conventions." P. 347.

And again at page 350:

"The States, or rather the people forming them, though sovereign as to the power not delegated to the United States by the constitution, nor prohibited by it to the States, are not independent of each other in respect to the powers ceded in the constitution.

"Their union by the constitution was made by each of them conceding portions of their equal sovereignties for all of them, and it acts upon the States conjunctively and separately, and in the same manner upon their citizens, aggregately in some things and in others individually, in many of their relations of business, and also upon their civil conduct as far as their obedience to the laws of congress is concerned.

"In such a union the States are bound by all of those principles of justice which bind individuals in their contracts. They are bound by their mutual acquiescence in the powers of the constitution that neither of them should be the judge of the powers of the constitution or of the interpretation of the laws of congress. This is not so, because their sovereignty is impaired, but the exercise of it is diminished in quantity, because they have in certain respects put restraint upon that exercise in virtue of voluntary engagements."

By their own consent the States submitted themselves to the judicial power of the United States in all cases to which that power extends. The submission of the original States was voluntary. The territory of Orleans possessed no sovereignty, but the act of congress authorizing the people thereof to form a constitution and State government required the convention to adopt the constitution of the United States, and to transmit to congress the instrument by which its consent to said constitution was given (2 Stat. 641); and the act admitting the State of Louisiana into the Union declared this condition, among others, a fundamental condition of such admission. 2 Stat. 701.

V.

Although the jurisdiction of the circuit court over this case is thus clearly established under the letter of the constitution, we need not rest our argument alone upon the consent of the State thus given.

The State of Louisiana, when it entered into the contract upon which the plaintiff sues, submitted itself to the judicial power for its enforcement.

Section 11 of the act under which the bonds were issued provides, "that each provision of this act shall be and is hereby declared to be a *contract* between the

State of Louisiana and each and every holder of the bonds issued under this act." And the constitutional amendment added the following guaranties: "The issue of consolidated bonds authorized by the general assembly of the State, at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the said State shall by no means and in nowise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the tax therefor. To secure such levy, collection and *payment* the *judicial power* shall be exercised when necessary."

The extension of the judicial power is to enforce not only the payment of the tax, but the payment of the obligation itself, The language employed is, "and to secure such levy, collection and *payment*." The words "levy and collection" apply to the tax, and the word "payment" applies to the principal and interest of the bonds themselves.

To the exercise of what judicial power did the State consent?

The words "judicial power" evidently include her own courts, but they also include all courts capable of taking jurisdiction *ratione materiæ*. A party may go into the federal court to enforce any right which he may enforce in a State court. "When a State submits itself without reservation to the jurisdiction of a court in a particular case that jurisdiction may be used to give full effect to what the State has allowed by its act of submission to be done." *Louisiana vs. Jumel, supra*, 728.

And there is instruction in what was said by Mr. Justice FIELD in his dissenting opinion in that case:

"I admit," said he, "that the rule of the common law, that the sovereign cannot be held amenable to process in

his own courts without his consent, is applied in this country to the State, under which designation are included the people within its territorial limits, in whom resides whatever sovereignty the State possesses. But they act and speak in this country, at least in time of peace, only through the constitution and laws. For their will we must look to these manifestations of it If in that way they consent to suits, either directly against themselves by name or against any of their authorized agents, there can be no reason of policy or of law against issuing process in proper cases to bring them or their agents before the court." P. 728.

Again he said: "It would puzzle the wit of man to find anywhere in the legislation of the world a more perfect assurance of the fixed purpose of a State to keep faith with her creditors, or of a pledge of a portion of their revenues for their payment, or of the submission of her officers to the compulsory process of the judicial tribunals if necessary to carry out her engagements." P. 731.

In the case of *Curran vs. Arkansas*, 15 Howard 304, it was objected that the State could not be sued. But the Supreme Court answered that the objection involved a question of local law, and that as the State permitted herself to be sued in her own tribunals, that was conclusive upon the subject."

And in *Davis vs. Gray*, 16 Wall 221, the doctrine was reaffirmed, and, after affirming it, the court said:

"A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality. The wise policy of the constitution gives him a choice of tribunals. In the former he may hope to escape the local influences which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount

involved be large enough, he may have access to this tribunal as the final arbiter of his rights."

By the submission of herself to the judicial power of her own courts the State submitted herself to the judicial power of the federal courts having jurisdiction *ratione materiæ*. She submitted herself to the jurisdiction of the court below because she made no exception. Even the Supreme Court of Louisiana, in the case of the *State ex rel. Hart vs. Burke*, put her exemption from suit to enforce this contract upon the ground that the constitutional amendment of 1874, which submitted the State of Louisiana to the judicial power, had been repealed by the constitution of 1879 and that submission taken away. Mr. Justice FENNER does not deny, but almost concedes the power of the federal courts to entertain jurisdiction in such a case, notwithstanding the constitution of 1879. Says Mr. Justice FENNER: "We have never heard it asserted that the sovereign right of immunity from suit without her consent, *in her own tribunals*, has ever been surrendered by any State under the provision of the federal constitution. This attribute of sovereignty pertains to the State of Louisiana as completely as if the constitution of the United States did not exist, and is in no manner affected thereby. Let it be observed that we confine our remarks exclusively to the *State* tribunals, and make no reference to the powers of the *federal* tribunals, which must determine their own jurisdiction." 33 La. An. 516.

And again he says:

"What sanction may exist for the enforcement of that provision of the federal constitution prohibiting a State from impairing the obligations of her own contracts it is not for us to say. The federal courts must determine for themselves their power in the premises." Ibid. 519.

Said Mr. Justice FIELD, in *Louisiana vs. Jumel, supra:*

"If the new constitution had never been adopted there could be no question as to the power of the State courts to require that the money collected be applied to the payment of the interest." P. 734. And commenting on the decision of the court in *State ex rel. Hart vs. Burke*, *supra*, which affirmed the power the State to impair the obligation of its contracts by means of constitutional provisions, he said:

"In thus holding, the court would seem to have lost sight of two provisions of the federal constitution, one of which declares that 'the constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land;' and the other which declares that 'the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.' These provisions, which govern in Louisiana as well as in other States, being overlooked, and the inhibition against the impairment of the obligation of contracts being limited to legislative action only on the part of the State, so far as concerns her own contracts, it is not surprising that the court held that the ordinance of repudiation and shame embodied in the new constitution was to be obeyed; that its conflict with the federal constitution was to be disregarded, and that what the State was prohibited from doing should be deemed the legal expression of her will, and enforced as such. The decision rests upon the theory that a proceeding against the officers of the State to compel them to do their duty is a suit against the State, and that her consent to a suit against them has been withdrawn by clauses of the new constitution. But if those clauses never lawfully became a part of the new constitution, because the State under the federal constitution was incapable of enacting them, then her consent remains, and the present

suits are simply attempts to compel her officers to do her lawful bidding. The State cannot speak through an enactment which contravenes the federal constitution." P. 741.

The Supreme Court of Louisiana assumed, that although the constitution of the United States prohibited the State from passing any law impairing the validity of a contract, the State by the adoption of a constitution could avoid that prohibition. The court overlooked the numerous decisions of this court declaring that provision of the constitution to be directed as well against impairing the obligation of a contract by constitutional amendment as by legislative authority; that in the meaning of the prohibition a constitution is a law.

In *Dodge vs. Woolsey*, 18 How. 331, it was held that "a change of constitution cannot release a State from contracts made under a constitution which permits them to be made." And in *Railroad Company vs. McClure*, 10 Wall. 511, that "the constitution of a State is undoubtedly a law" within the contract clause of the constitution, and that "a State can no more do what is thus forbidden by one than by the other."

"A State can no more impair the obligation of a contract by her organic law than by legislative enactment, for her constitution is a law within the meaning of the contract clause of the national constitution." *N. O. Gas Co. vs. Louisiana Light Co.*, 115 U. S. 672; *Stewart vs. Jefferson Police Jury*, 116 U. S. 131; *White vs. Hart*, 13 Wall. 646; *Gunn vs. Barry*, 15 Wall. 610.

"And the obligation of her contracts is as fully protected by that instrument against that impairment by legislation as are contracts between individuals exclusively." *N. O. Gas Co. vs. La. Light Co., supra; New Jersey vs. Wilson* 7 Cranch. 164; *Providence Bank vs. Billings*, 4 Pet. 514;

Green vs. Biddell, 8 Wheat. 1; *Woodruff vs. Trapnall*, 10 How. 190; *Wolf vs. New Orleans*, 103 U. S. 358; *Poindexter vs. Greenhow*, 114 U. S. 297; *Fletcher vs. Peck*, 6 Cranch. 87.

Says Mr. Justice FIELD, in *Louisiana vs. Jumel*, *supra*: "When a State enters into the markets of the world as a borrower she for a time lays aside her sovereignty and becomes responsible as a civil corporation." P. 740.

He but reiterated the language of this court in *Murray vs. Charleston*, 96 U. S. 445: "The truth is, States and cities, when they borrow money and contract to pay it with interest are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being, in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. *A promise to pay with a reserved right to deny or change the effect of a promise is an absurdity.*"

Mr. Hamilton said the same thing in the early days of the republic: "When a government enters into a contract with an individual *it deposes* as to the matter of the contract, its constitutional authority, and exchanges the character of *legislator* for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as *excepted out of its power to legislate*, unless in aid of them. It is in theory impossible to reconcile the two ideas *of a promise which obliges* with a power to make a law which *can vary the effect of it*. To do this would be '*a fraud*.' "

"When a State enters into a copartnership or becomes a stockholder in a bank or other corporation its sovereignty is not involved in the business, but it stands and is

treated as other stockholders or partners." *Penn vs. Wheeling Bridge Co.*, 13 How. 560.

VI.

In *State ex rel. Hart vs. Burke, supra*, the Supreme Court of Louisiana held that the constitution of 1879 deprived the courts of the State of jurisdiction to enforce the contracts of the State in relation to these bonds.

"To take away all remedy for the enforcement of a right is to take away the right itself. But that is not in the power of the State." *Poindexter vs. Greenhow*, 114 U. S. 303; *Brown vs. Kinsie*, 1 How. 311, 317; *McCracken vs. Hayward*, 2 How. 608; *Louisiana vs. New Orleans*, 102 U. S. 203, 206; *Siebert vs. Lewis*, 122 U. S. 284, 295.

The constitutional protection of contracts is judicially enforced in suits growing out of them. *In re Ayres, supra*, p. 504; *Castro vs. Greenhow*, 114 U. S. 322

In *Louisiana vs. Jumel, supra*, referring to the contract here involved, it was held that "whatever may be ordinarily the effect of a promise or a pledge of faith by a State the language employed in this instance shows unmistakably a design to make these promises and these pledges so far contracts that their obligation would be protected by the constitution of the United States against impairment;" and that the State had violated its contract and had impaired the obligation thereof by the constitution of 1879. Pp. 720, 721.

Effect to the constitutional guaranty could not be given in that case, because the action was not such as to authorize the court to grant the relief prayed.

It was contended in the court below and probably will be here that the rulings of this court in *Louisiana vs. Jumel* and *Elliott vs. Wiltz* are decisive of the case at bar. But in our opinion those rulings sanction our action in the

form in which it is brought and, we might add, suggested it.

Those cases were not actions upon contract obiigations of the State, seeking the enforcement thereof, but to establish the validity of all such obligations as an abstract proposition. In the one case the plaintiffs sought to enjoin an officer of the State from obeying the mandates of the constitution of 1879 in violation of the amendment of 1874. In the other case they asked that the officers of the State be compelled to execute the contract of 1874—not in their own behalf, but in behalf of everybody who was interested in it. They were philanthropists seeking the general good. They asked the court to sit for the purpose of enforcing an obligation in favor of the whole world, and not for any special relief for themselves.

Before the case went to trial they abandoned their claims for individual relief, and struck their demands therefor out of their pleadings. They in effect asked the court to take charge of the finances of the State, and to administer them for the benefit of all who were interested in the execution of the contracts into which the State had entered.

What did the court say? "The bonds and coupons which the parties to these suits hold have not been reduced to judgment, and there is no way in which the State, in its capacity as an organized political community, can be brought before any court of the State or of the United States to answer a suit in the name of *these holders* [they were citizens of New York] to obtain such a judgment.

* * * * * * *

"Neither was there when the bonds were issued nor is there now any statute or judicial decision giving the bondholders a remedy in the State courts or elsewhere, either by *mandamus or injunction*, against the State in its political capacity, to compel it to do what it has agreed should be done, but which it refuses to do." P. 720.

Does this exclude all remedy? Does this prevent the plaintiff from appealing to the judicial power to enforce the contract which the State made with him? Does this prevent a *citizen of the State* from bringing a suit arising under the constitution of the United States to enforce the prohibition against the impairment of his contract? There is not a word in this decision which excludes the remedy sought in this case or the jurisdiction we are now seeking to maintain. The court said:

"The question then is, whether the contract can be enforced, notwithstanding the constitution, by coercing the agents and officers of the State whose authority has been withdrawn in violation of the contract, *without the State itsetf, in its political capacity, being a party to its proceedings.*" Page 721.

One objection to the jurisdiction of the court was that the State was not a party to the proceedings. We have avoided that objection in this case by suing the State instead of her officers.

Again said the court:

"So that the remedy sought implies power in the judiciary to compel the State to abide by and perform its concontracts for the payment of money, not in rendering and enforcing a judgment in the ordinary form of judicial procedure, but by assuming the control of the administration of the fiscal affairs of the State to the extent that may be necessary to accomplish the end in view." P. 722.

We are seeking a judgment in the ordinary form of judicial procedure.

Where is the parallel between the cases? We fail to see any, but on the contrary the case at the bar has obviated every objection made to the form of proceeding and want of a proper party upon which the court placed its refusal to act in those cases.

The State having consented to be sued, and made such consent a matter of contract, upon which it had obtained a loan of money, cannot withdraw its consent to the injury of the party with whom it contracted. Such withdrawal would impair its contract in violation of the constitution of the United States.

The case is one of those in which the duty of the courts of the United States to exercise the judicial power confided to them by the constitution was declared by Chief Justice MARSHALL in *Dartmouth College vs. Woodward*, 4 Wheat, 518, in the following language:

"The American people have said in the constitution of the United States 'that no State shall pass any bill of attainder, *ex posto facto* law or law impairing obligation of contracts.' In the same instrument the law also said 'that the judicial power shall attend to all cases in law and equity arising under the constitution. On the judges of the court there is imposed the high and solemn duty of protecting, from even legislative violence, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we may not shrink."

The extension to and exercise of judicial power in such cases is, in the language of Chief Justice JAY, *supra*, "*wise*, because it is *honest* and because it is *useful*. It is *honest* because it provides for doing justice without respect to persons, and by securing individual citizens as well as States in their respective rights, performs the promise which every government makes to every free cititizen of equal justice and protection."

By the exercise of such jurisdiction States may be compelled to be honest; the purpose of the constitution to establish justice will be accomplished, and the supremacy of the constitution and laws of the United States forever es-

tablished. However irksome the task may be, it is a duty from which this court may not shrink.

The judgment of the lower court should be reversed, and that court directed to proceed with the case according to law.

Respectfully submitted,

J. D. ROUSE,
WILLIAM GRANT,
Attorneys for Plaintiff.

New Orleans, La., October, 1888.

APPENDIX.

No. 3.] AN ACT

To provide for funding obligations of the State by exchange for bonds; to provide for principal and interest of said bonds; to establish a board of liquidation; toauthorize certain judicial proceedings against it; to define and punish violations of this act; to prohibit certain officers diverting funds, except as provided by law, and to punish violations therefor; to levy a continuing tax and provide a continuing appropriation for said bonds; to prohibit injunctions in certain cases; to limit the indebtedness of the State, and to limit State taxes; to annul certain grants of State aid; to prohibit the modification, novation or extension of any contract heretofore made for State aid; to provide for the receipt of certain warrants for certain taxes, and to repeal all conflicting laws.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That for the purpose of consolidating and reducing the floating and bonded debt of the State the governor, lieutenant-governor, auditor, treasurer, secretary of State and speaker of the house of representatives are hereby authorized to cause to be prepared and to issue bonds to be known as "consolidated bonds of the State of Louisiana," of the denominations of one hundred, five hundred and one thousand dollars, to the amount of fifty millions of dollars, or so much thereof as may be necessary, all payable forty years from the first day of January, 1874, and all to be numbered consecutively and made payable to bearer, and to bear interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York and city of New Orleans, on the first day of July and January of each year, and coupons for such in-

terest shall be annexed thereto; said interest and principal to be payable in lawful money of the United States.

Sec. 2. *Be it further enacted, etc.*, That the parties designated in the foregoing section shall constitute a board of liquidation, and a majority of said board shall elect a fiscal agent for the State, who shall be a member of said board.

Sec. 3. *Be it further enacted etc.*, That said bonds authorized by section one shall be signed by the governor, auditor and secretary of State, and the coupons shall be signed by the auditor and treasurer, and when so prepared said bonds shall be exchanged by the board of liquidation for all valid outstanding bonds of the State and all valid warrants drawn previous to the passage of this act by the respective auditors of public accounts of the State on the treasurer thereof, except warrants issued by the auditor in payment of the constitutional officers of the State, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants: *provided*, that the holder of any bond or valid warrant rejected by a majority of said board may apply by petition to the proper court for relief, and if final judgment shall be rendered in his favor against said board it shall be the duty of said board to fund his claim in bonds at the rate provided by this act; *and provided further*, that if any member of said board of liquidation shall knowingly audit and fund any illegal claim against the State he shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined not less than five thousand dollars and be imprisoned not less than two years, at the discretion of the court; and any person knowingly procuring the same to be done shall be subject to the same penalty.

Sec. 4. *Be it further enacted, etc.*, That the exchange of the bonds or valid warrants authorized by this act shall

be effected by said board of liquidation in the cities of New Orleans and New York.

Sec. 5. *Be it further enacted, etc.*, That the consolidated bonds herein authorized shall be held and used by said board of liquidation only for the purpose of exchange as aforesaid; said bonds shall be used for no other purpose or purposes than as authorized by this act, and any member of the board of liquidation using or attempting to induce any person or persons to use said bonds or any of them for any other purpose or purposes shall, on conviction thereof, be punished by a fine of not less than five thousand dollars and by imprisonment at hard labor for not less than one year.

Sec. 6. *Be it further enacted, etc.*, That notice of the adoption of this act shall be published by said board in one or more journals of New Orleans, New York, London, Paris and Amsterdam.

Sec. 7. *Be it further enacted, etc.*, That a tax of five and a half mills on the dollar of the assessed value of all real and personal property in the State is hereby annually levied and shall be collected for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated for that purpose and no other. And that it shall be deemed a felony for the fiscal agent or any officer of the State or board of liquidators to divert the said fund from its legitimate channel as provided, and upon conviction the said party shall be liable to imprisonment for not more than ten years nor less than two, at the discretion of the court. If there shall during any year be a surplus arising from said tax, after paying all interest falling due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this act, said purchases to be made by said board of liquidation

from the lowest offers after due notice; *provided*, that the total tax for interest and all other State purposes, except the support of public schools, shall never hereafter exceed twelve and a half mills on the dollar. The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall be a continuing annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the auditor and treasurer and the said board, respectively, to collect said tax annually, and pay said interest and redeem the said bonds until the same shall be fully discharged.

Sec. 8. *Be it further enacted, etc*, That the bonds and valid warrants outstanding at the time of the passage of this act shall, as fast as they are received in exchange for consolidated bonds, be cancelled and destroyed by the said board of liquidation; and consolidated bonds purchased as provided for in section seven of this act shall be cancelled and destroyed after public notice has been given of the same in the official journal of the State, in the presence of as many citizens as may desire to be present. In like manner and within ten days after such destruction, in each case, a *proces verbal* of the same shall be published and a report made to the general assembly on the first Monday of every year by said board.

Sec. 9. *Be it further enacted, etc.*, That it shall be the duty of the auditor in his next annual report to give a detailed account of the proceedings had under this act, including the amount of new bonds issued, the amount of old bonds and valid warrants cancelled, the amount of the same outstanding and the cost of the exchange; and annually thereafter a full and exact statement of the condition of the public debt under the operations of this act.

Sec. 10. *Be it further enacted, etc.*, That any judge, tax-collector, or any officer of the State, obstructing the execution of this act, or any part of it, or failing to perform his official duty thereunder, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment not exceeding five years or by fine not exceeding two thousand dollars, at the discretion of the court; *provided*, that this section shall in nowise prejudice or affect the criminal proceeding under section five of this act.

Sec. 11. *Be it further enacted, etc.*, That each provision of this act shall be and is hereby declared to be a contract between the State of Louisiana and each and every holder of the bonds issued under this act.

Sec. 12. *Be it further enacted, etc.*, That all grants of State aid heretofore made, whether of bonds, endorsements, subscriptions of stock or otherwise, which have become lapsed or forfeited, be and the same are hereby repealed and annulled nor shall the State hereafter modify, novate; or extend any contract heretofore made for the giving of State aid in any form or under any pretext.

Sec. 13. *Be it further enacted, etc.*, That the entire State debt, prior to the year of our Lord nineteen hundred and fourteen, shall never be increased, directly or indirectly, beyond the sum of fifteen millions of dollars, hereby authorized, it being the interest and object of this act and of the exchanges to be effected thereunder to reduce and restrict the whole indebtedness of the State to a sum not exceeding fifteen millions of dollars, and to agree with the holders of the consolidated bonds to be issued hereunder that said indebtedness shall not be increased beyond said sum during said period.

Sec. 14. *Be it further enacted, etc.*, That any tax-collector who shall turn over any money or warrants by

him collected to any person except to the State treasurer shall be deemed guilty of a misdemeanor, and shall, on conviction, be subject to the penalties prescribed in section ten of this act, and shall, in addition thereto, be liable in damages in double the amount so turned over. Any State officer requiring or demanding that said taxes shall be turned over to him, except the treasurer of the State, shall be liable on conviction to the same penalties as are prescribed in this section.

Sec. 15. *Be it further enacted, etc.*, That from and after the passage of this act until the first day of July, 1874, all valid auditor's warrants issued for debts due prior to January 1, 1874, shall be received for all back taxes, licenses and interest and penalties thereon due prior to said first of January, 1874, except two mills for school fund, three mills for levee construction and repair fund, and two mills to the interest fund for the purpose of paying any interest in arrears accruing on the bonded debt of the State prior to the passage of this act.

Sec. 16. *Be it further enacted, etc.*, That no court or judge thereof shall have power to enjoin the payment of principal or interest of any bond issued under this act, or the collection of the special tax therefor, or to enjoin any officer of the State or parish in receiving warrants as is prescribed in section fifteen of this act.

Sec. 17. *Be it further enacted, etc.*, That all acts or parts of acts in conflict with this act or any section thereof are hereby declared to be repealed, and that this act shall take effect from and after its passage.

CHARLES W. LOWELL,
Speaker of the House of Representatives.
C. C. ANTOINE,
Lieutenant-Governor and President of the Senate.
Approved January 24, 1874.
WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

JAN 22 1890

Supreme Court of the U. S.

October Term, 1889.

No. 4.

BERNARD B. HANS,
vs.
THE STATE OF LOUISIANA.

Upon opposition to defendant's motion for leave to file affidavit.

The substance of the affidavit is, that the plaintiff *is* not the holder or owner of the coupons upon which his suit was brought; that other persons named, *are* the owners and holders, and that these alleged facts were ascertained in October last, from the testimony of the plaintiff and one other person, given before the grand jury.

It is not pretended that the plantiff was not the owner or holder of the coupons, at the time this suit was brought or when the writ of error herein was sued out. It is not pretended that the State has any defence against the alleged real owners, of which it would be deprived in the suit by the plaintiff. It is not alleged, nor is it true, that said alleged owners, are not citizens of Louisiana. It is not pretended that any fraud upon the jurisdiction has been committed, and none has been committed.

The coupons sued on are payable to bearer, and payment to the holder will discharge the debt of the defendant. Possession of a promissory note payable to bearer, or to order and indersed in blank, is *prima facir* evidence of title, and its productien in evidence in plenary proof thereof. *Collins* v. *Gilbert* 94 U. S. R. 753.

The defendant not alleging any meritorious defence, cannot urge that the plaintiff is no longer the real party in interest . *Lum* v. *Robertson* 6 Wall 277. *O'Brien* v. *Smith* 1 Black, 99.

The case was heard on demurrer. The matter alleged in the affidavit if coupled with proper averments, might be availed of upon a plea to the action. Here it is a matter *de hors* the record. We know of no procedure whereby issues of fact *de hors* the record can be joined or tried in this Court upon error. This court acts upon the case as made in the court below when judgment was rendered, and will not go outside of the record as then made up. *Otis* v. *Oregon Steamship Co.*, 116 U. S. R.548; *Simmerman* v. *Nebraska*, 116 U. S. R. 54; *Reed* v. *Marsh*, 13 Pet. 153.

The affidavit discloses that the alleged facts were known to the Attorney General last October; but they were first made known to this Court as well as to counsel on the day assigned for the judgment of the case.

We respectfully submit that the affidavit should not be permitted to be filed.

J. D. ROUSE,
WM. GRANT,
Of Counsel for Plaintiff in error.

Washington, D. C., *January 20, 1890.*

IN THE

Supreme Court of the United States,

THIS 21st DAY OF JANUARY, A. D. 1890.

OCTOBER TERM, 1889.—No. 4.

BERNARD B. HANS

vs.

THE STATE OF LOUISIANA.

MOTION ON BEHALF OF DEFENDANT IN ERROR.

And now comes the defendant in error, through Alexander Porter Morse, its counsel, and moves the Court as follows:

1. That the defendant in error have leave to file the annexed affidavit.

2. That a rule be granted against plaintiff in error to show cause, if any, why the matter set forth in the said affidavit should not be inquired of by this Court and such action had thereon as may be agreeable to the course of practice and decision in this tribunal.*

3. And that pending proceedings under such rule the hearing of this cause be postponed.

ALEXANDER PORTER MORSE,
Of Counsel for Defendant in Error.

* Lord *vs.* Veazie, 8 Howard, 255.
Chamberlain *vs.* Cleveland, 1 Black, 425.
American Wood Paper Co. *vs.* Heft, 366.
Dakota *vs.* Glidden, 113 U. S., 225, 226.

STATE OF LOUISIANA, *City of New Orleans:*

Walter H. Rogers, attorney general of the State of Louisiana, makes oath and says:

That there is now pending before the Supreme Court of the United States the cause of Bernard B. Hans *vs.* The State of Louisiana, and the same has been fixed for hearing on Monday, January 20th, 1890.

That although Bernard B. Hans appears by averment in the record as the owner of the coupons sued upon and is appellant from the judgment against him, he is not the owner of said coupons; that he is totally without interest in the same; that the same are owned by Isidor Newman, Moore Hyams & Co., and Fazende & Seixas, of the city of New Orleans.

That your deponent, who was not attorney general when the said cause was tried in the circuit court, discovered said fact during an investigation into the defalcation of one, E. A. Burke, late treasurer of the State of Louisiana, about October, 1889; that said Hans testified before the grand jurors of the parish and city of New Orleans that he did not own said coupons sued upon, did not have them in his possession, that he simply allowed the use of his name, and that the real owners were Isidor Newman, Moore Hyams & Co., and Fazende & Seixas, of this city.

That said Isidor Newman also testified to same facts and furnished a list of said coupons, which were then and now in his possesion.

That the said Hans is without interest in the matter and is urging a purely moot proposition to this honorable Court,

in the result of which he has not and cannot have any interest whatsoever.

That no evidence was in writing taken before said grand jury.

That these facts are presented to the Court for such action as may to it seem just and proper, and for the further reason that deponent believes it to be his duty as a public officer to furnish said information; that all of said facts are true and he is prepared to fully substantiate the same in any manner or form of proceedings that this honorable Court may require.

W. H. ROGERS,
Attorney General, State of Louisiana.

Sworn to and subscribed before me, notary, on this 18th day of January, 1890.

BENJAMIN ORY,
[L. S.] *Notary Public.*

Supreme Court of the United States.

OCTOBER TERM, 1889.

BERNARD B. HANS, Plff in Error and Appellant,
vs. No. 4.
THE STATE OF LOUISIANA, Deft in Error and Appellee.

In Error to the CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR Plff in Error

B. J. SAGE,
A. PORTER MORSE,
Of counsel for the State of Louisiana.

These are federal suits on simple debts, or bonds or coupons, brought by persons who are members, citizens and subjects of their respective States.

This court has many times ruled that neither the several States nor their union can be sued without their consent, and indeed, has never seemed to think otherwise. Hence it were absurd for me to argue and cite authorities to show the court to be right.

But the point is now made here and the affirmative held with much force and show of authority, and I beg leave to submit some deductions from the constitu-

tional provisions involved, as well as from cardinal principles and leading authorities, in the negative.

I shall contend:

1. That there can be no jurisdiction over the governing power or its case without its consent.

2. That in our system, all intended jurisdiction is written, and the parties designated.

3. That it seems fatal to these cases that the Supreme Court has original jurisdiction, in all cases in which a State shall be a party. The option given by Congress to States and ambassadors to sue in inferior federal courts affects not the question.

4. That in the nature of things, the court (or judicial agency,) instituted by the governing power, can have no jurisdiction over it.

5. That Chisholm *vs.* Georgia, is not citable.

I.

There can be no jurisdiction over the governing power or its case, without its consent.

One of the briefs, that of Mr. Phillips, in the case of North Carolina *vs.* Temple, states that,—

By the common law, the English Crown is obliged at the instance of a subject or alien friend, to refer to the regular courts for hearing and determination, whatever issues upon rights of property may have been raised by the act of the crown, if such issues would have been so referable, if raised by the act of a private party.

That is to say, if the law provide that the crown or its representative may be impleaded in a given case or class of cases, the judgment that may be rendered will be complied with. This is a fair statement of our law. If there be a constitutional provision or special statute showing a continuing consent of these States to be sued, they will appear in court, and if cast, satisfy the judgment.

This position of the opposing counsel is sustained by English authorities, but these also show the consent of the crown to be a condition precedent to jurisdiction.

"In re. Ware's Trusts," 23 Law Times, R., 737, it is said that "where the crown being interested in respect of administration duty, *consented* to appear, the court decided the question between the crown and the subject on petition." "Where the crown *consented* to appear."

In the case of Atkinson *vs.* The Queen's Proctor, 25 Law Times, R., 164, Lord Penzance said:

"I find no case, statute or principles from which it can be deduced, that the court is entitled to make an order for costs as against the crown. It is a general principle well-known in Westminster Hall, that the crown is not liable as regards costs, and it is another principle, that the crown is not bound by any statute unless specially named."

And in Queen *vs.* Commissioners, English Law Reports, 7 Queen's Bench, 894, the Lords Justices held that "when a duty has to be performed (if I may use that expression) by the crown, this court cannot claim, even in appearance, any power to command the crown; the thing is out of the question. Over the sovereign we can have no power."

The same principle is recognized in the case of Hettihewage Appu *vs.* The Queen's Advocate, 9 Appeal Cases, 571, which came before the House of Lords or the Judicial Committee of Privy Council, from Ceylon. It was contended that before the transfer of sovereignty from the Dutch to the English, the Dutch-Roman law recognized a usage that the representative of the sovereignty was suable: the court held that there was no evidence of such usage, but that, under a long existing statute, the English Crown's Official—

say the Queen's Advocate, was impleadable, and that as the defendant in a suit brought by the crown, had pleaded and proved a reconventional demand against the crown, it must be sustained and allowed as a set-off; but it was distinctly recognized that the court could only take cognizance of an issue against the crown by its consent.

In the case of Twycross *vs.* Dreyfus, 5 Ch. Div., 605, it was held that the sovereignty of Peru could not be cited, either at home or in the courts of England, because not subject to suit. All the above cases agree with the rulings of our court, which I need not cite, for the reason above given.

If, therefore, our crown or sovereign or political people, be shown to have consented to this jurisdiction, either in the Federal Constitution or by a special statute, and this consent be continued; (but not otherwise) the court can proceed to hear and determine, and its judgment will be complied with. But I submit that it is only the issue or case that the court determines—compliance being, in the nature of things, *ex gratia*.

II.

In our system, all intended jurisdiction is written, and the parties designated.

We must keep it in mind that our constitutions and laws are the offspring of the political people's will, and are written so that the subjects can *read* and *know* and *obey* them, *e. g.*, the written words "*between a State and citizens af another State*" were the sole alleged basis of citing Georgia in the Chisolm case, so the written words "between a State and her citizens" are needed to justify citing North Carolina and Louisiana herein.

Now, considering that the "duties" of this Government are "defined" and the "objects of its attention" "designated" in writing, it will strike any lawyer, who looks closely, that the actual *designation* of parties by the constitution itself, excludes the defendants in these cases. It is obvious that the States, in the act of uniting themselves and forming their agency of Federal Government, have vested their judicial power—that is to say, "the judicial power of the United States"—by Article III of their constitution, "in one supreme court, and in such inferior courts as the Congress may from time to time establish;" and that, on surveying the whole field of possible parties, they have carefully provided that their "judicial power shall *extend* to all cases, in law and equity, arising under this Constitution," the laws, treaties, etc., and have then proceeded to "designate" precisely the parties over whom, and over whose cases, the said "judicial power shall *extend*," viz.:

1. Cases affecting ambassadors, etc.

2. Cases of admiralty, etc.

3. Cases between the United States and other parties.

4. Cases between two or more States.

5. Cases between a State and citizens of another State.

6. Cases between citizens of different States.

7. Cases between citizens of the same State, claiming land under grants of different States.

8. Cases between a State or her citizens and foreign States or citizens.

These are all the cases. The case between A CITIZEN AS PLAINTIFF AND HIS OWN STATE, is left out, because "the parties to the compact"—as Hamilton called them—did not *intend* to "*extend*" the power to it.

It seems to me important here to note, that the whole field of Federal jurisdiction is gone over a second time in the same article, in declaring and defining what is original and what is appellate. In certain cases "the Supreme Court," it is said, "shall have original jurisdiction." "*In all the other cases beforementioned* the Supreme Court shall have appellate jurisdiction," etc. Original and appellate must cover the whole ground of Federal jurisdiction, and of course include that of the "inferior courts." It seems obvious, therefore, that this case is not within intendment—*i. e.*, within the language of the instrument as an implicated fact. If such fact be not there found, we must infer that the political people did not intend that their "judicial power shall extend" to it. Neither case nor party is "defined" or "designated."

A feeble attempt to evade this exclusion by nonmention, is made by asserting that THE SUBJECT-MATTER GIVES JURISDICTION, irrespective of parties, because it is written that the Federal "judicial power extends to all cases in law and equity arising under this constitution" and the federal laws and treaties; but, obviously, this begs the question, for the obligations sued on are those of the people—the political people—the governing power; and to execute the judgment, the Government's means of governing, and of supporting government, must be seized and sold. The judicial power belongs to the political people, as their agency and instrumentality for doing justice, and they submit—not themselves, but—their cases to it. Evidently, our opponents do not reflect that "the subject-matter" must be in a *case* of law or equity; that a case must be between *parties*, and that the parties must be *specified* in the constitution.

III.

It seems fatal to these cases that the Supreme Court has original jurisdiction in all cases in which a State

shall be a party. The option given by Congress to States and ambassadors to sue in inferior federal courts affects, not the question.

The constitution actually excludes the jurisdiction in question and places the matter beyond argument, and as these two States have in formal pleading, plainly refused their consent to be sued in the federal Circuit Court, this supreme tribunal can but say to these plaintiffs: "This is your only court of first instance because it is written in 'the Supreme Law,' that *in all cases*,' '*in which a State shall be a party, the Supreme Court shall have original jurisdiction.*" That is a plain constitutional provision which these States have a right to, and which they now claim in formal pleading.

The law of Congress giving the federal Circuit Courts jurisdiction of suits brought by ambassadors or States, simply gives them the choice of that jurisdiction, but gives to the court no power of citing them.

IV.

In the nature of things, the court (or judicial agency) instituted by the governing power, can have no jurisdiction over it.

It is certain that the political people, whether formed as a nation or a federacy are the sovereign power, and that this honored tribunal—"the people's" most eminent and august public servants, are its agency for doing *national* or *federal* justice, no matter how the said justice is styled; and I submit, that neither naturally nor lawfully can the political people or sovereign power, whether nation or States, be subjected to the jurisdictional coercion of its judicial servants, and that this tribunal can but use the very language I have quoted from the English cases, viz:

"This court cannot claim, even in appearance, any power to command the crown * * * over the sovereign we can have no power."

It seems plain that here as in England, the court in such cases decides the "controversy" or "issue," but has no coercive right over States or "the United States" as will be more clearly seen. But let us exhibit the actual.

GRADES OF GOVERNING AUTHORITY.

In arguing from the nature of things, may we not say that sovereignty is the top of authority, or rather the sum of authority, it being the plenary right of Government which delegates all ruling power. I beg leave to symbolize this right, which necessarily dwells always in the political people, by an indelible line. It matters not whether they are one State or forty-two; I symbolize their constitution by drawing under it a second line; their Government by a third; and the people and their belongings, which are the subjects of Government, by a fourth and bottom line. I thus depict the everlasting grades of republican authority in a collocation which revolution only can change. "The people" are atop and the people are at the bottom—each man being a subject, and indeed, voting only as a subject, at the bottom, while each man is a part of the governing power, this two-fold capacity being a necessity of self-government. The people as organized, govern the people as persons, society governs its members. Hence the court must see, on reflection, that the inherent and original authority, the sovereign power, symbolized by the first line—cannot be under to derivative authority symbolized by the third; or in other words, that the master and sovereign cannot be subject to a citation, capias, fieri facias, mandamus, or any other coercive process issued by his judicial servant.

I find no evidence in American History that anyone of note ever thought otherwise. Most striking is the concurrence of Madison, Mason, and Marshall in the Virginia ratifying convention—no three actors being higher authority. (III Ell. Deb., 527, 533, 555).

In showing further how the nature of things, or philosophy affects, or perhaps controls the matter, I beg leave to quote from an argument prepared and printed for a case some years ago, involving mainly the same issue.

"In considering questions involving the parties to—the obligations of—and the remedies on, government bonds, it must always be kept in mind that *one party is above, and the other beneath the law.* In every transaction of a person with a State, or with the association of States, these relative positions are maintained; one is subject to judicial coercion, while the other is not. Every federal or State bondholder contemplated this, and agreed to it. He can have no judicial aid to compel either the State or the United States to pay the bond. He must rely for his payment alone on the obligor's good faith. The alternative is war. This is plain common sense, and is the principle recognized by Mr. Webster in his celebrated Baring letter of 1839, and I know of no eminent publicist who ever thought otherwise.

"Such contract consists of essential obligations and qualities, and is an entity, with a make-up and character established at its origin. Mere transfer from a private party to a State cannot so change it that rights of action will spring from it, which could not do so originally. Is such bond technically a chose in action? Surely the heart of it; in other words, that which is bought and sold—the thing of value—is a government's promise—a sovereign's faith. Further on, I think we shall see clearly that there can be no judicial cognizance of it."

Again: "The law of the land and the *status* of the obligor are to be considered as a part of said contract,

so that subjection to the law, and to judicial coercion, were not obligations thereof, and were not contemplated by the parties. In short, non-coercion was agreed to beforehand—the holder of a State bond, like the holder of a federal one, accepting the good faith of the obligor as the obligation of the contract. As the great Hamilton deliberately wrote on this very subject, the State is 'free from every constraint but that which flows from the obligations of good faith.' (Federalist, Art. 81.)

Again, in the exercise of such coercive jurisdiction, the "house is divided against itself"—*Government attacks itself.*

"This is, if possible, a more serious objection than any yet considered. This debt is owed by the people in their governing capacity, and it is the property and means they hold for governmental purposes, which are sought to be executed; and it is the same, whether we adopt the theory of State or national sovereignty. Suppose we admit, for argument's sake, the latter, namely: that *the States govern by virtue of the nation's delegative authority, having no status or rights but what the nation has given them.* As people, therefore, they are integral parts of the nation, charged by it with the major portion of the functions of the government, and holding from it, in trust, the public property and means consecrated to governmental purposes. Now we can see how absurd it would be for the judicial servitors of this great unity of government to be ordered to attack the other institutional parts of the same government, and seize and sell all the material means they hold in trust for performing their duty. So that the national theory, which both history and philosophy stamp as untrue and absurd, does not help the opposition at all. To give the Government coercive power over itself, or any portion of itself—power to seize and sell its own means—power to mandamus or enjoin all its parts in detail, is like 'attempting,' as Governor Sullivan aptly said, 'to erect a temple beneath its own foundations.'"

Again, "*no means exist to make a state pay.*" The people have never delegated to their judicial agency,

either in constitution or statute, any authority or machinery whatever to compel the political people to pay their public debts. Indeed, they, in establishing the constitution, acted in view of the oppressive debts they then owed, and sought to prevent the possibility of such coercion. All contemporaneous history proves this, especially that of the eleventh amendment. In fine we lack, as we probably ever will lack, the law and machinery for such coercion, for surely as the constitution contains no such power, and prohibits all powers not delegated, no congress of states will ever dare to provide for a coercion of themselves severally. The power to do so was emphatically reprobated and rejected in the covention of 1787, as often as proposed, and was moreover carefully guarded against, so as to cover every possible case or attempt."

V.

CHISHOLM V. GEORGIA IS NOT CITABLE

As to jurisdiction; and I beg leave to submit that it should be repudiated in all its parts, by bar and bench, because it was adjudged and condemned as usurpatory by the political people.

The moment the usurpation took place, Massachusetts, in her legislature struck the key-note of amendment, as follows—to which there was no discordant sound of any note. Her motion was to "obtain such amendments * * * as will remove any clause or article of the said constitution, which may be *construed* to imply a decision that a State is compelled to answer, *in any suit by an individual or individuals*, in any court of the United States." This, therefore, became subsequently the *fiat* of the political people:

"*We are not under judicial coercion; our ruling will is not subject to constraint.*" Accordingly, Congress formulated the eleventh amendment, which was adopted by the States, and added to the Constitution in 1798; and the Federal Supreme Court, in Holling-

worth *vs.* Virginia, considered that the amendment was "adopted by the constitutional number of States," (not the nation), and unanimously decided that "there could not be exercised any jurisdiction in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign State." Undoubtedly the object of the amendment was to keep the political will, which acts in all *devising* of government; in all *establishing* of government; and in all *executing* of government, just as it was before the Constitution was made—"free from every constraint but that which flows from the obligations of good faith."

IN CONCLUSION,

I beg leave to submit, with great deference, as well as fear that I may be found somewhat in error—the conclusions to which my research and reasoning have led me.

1. The contention, resulting in the eleventh amendment, was the non-suability of the State; and the wording of the said amendment naturally followed the fact that the plaintiff in the Chisholm case was a "citizen of another State;" and moreover the suit in the federal court by a citizen against his own State without her consent was probably thought of as absurd, if thought of at all.

2. The so-called amendment amended nothing, but condemned and forbade a usurpation, attempted under pretence of construction—or, in other words, an assumption of power—as Massachusetts expressed it—"repugnant to the first principles of a federal government."

3. The thing bought, in a State or federal bond, is the pledge of faith and honor—this being the "obligation of the contract."

4. It is not a chose in action, as no right of action was intended, or could spring from it. The "*consent*" of the State, or of the Union, (and not the right of action), is what gives the right to hear and determine.

5. No coercive jurisdiction exists or can exist in the federal court over a State, or the Union, because the court derives its whole *existence*, and all its *authority* from "the several States which may be included within this Union," *i. e.*, "The United States." [Const., Art. I.]

6. In any "controversy" to which the State or the Union is a party, such party "*refers to the regular courts for hearing and determination, whatever issues*" it *consents* to be impleaded on, but is itself not in and under the dominion of the federal agency or any part thereof, in any sense or for any purpose.

7. If the judgment be against the State or Union, compliance is necessarily *ex gratia*, and sovereign faith is the security.

8. I submit that Congress has no power to add to constitutional jurisdiction, or to the means or machinery of judicial coercion of States to pay their debts, since "nothing is to be taken as conceded, but what is given in unmistakable terms, or by an implication equally clear." 7 Otto, 659.

B. J. Sage,
A. Porter Morse,
Of Counsel for the State of Louisiana.

SUPREME COURT

OF THE UNITED STATES.

No. ~~257.~~ 22

BERNARD B. HANS, PLAINTIFF IN ERROR.

versus

THE STATE OF LOUISIANA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF ON BEHALF OF THE STATE OF LOUISIANA.

WALTER H. ROGERS,
Atty-General State of Louisiana, for Defendant.
M. J. CUNNINGHAM,
Ex. Atty. Genl. of La Of Counsel.

SUPREME COURT

OF THE UNITED STATES.

No. 257.

BERNARD B. HANS, PLAINTIFF IN ERROR,

versus

THE STATE OF LOUISIANA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF ON BEHALF OF THE STATE OF LOUISIANA.

The plaintiff, Hans, *a citizen of the State of Louisiana*, brings this action against the *State of Louisiana*. The State is the only party defendant. Judgment is prayed against her absolutely for the sum of eighty-seven thousand five hundred dollars ($87,500),

with legal interest from January 1, 1880, until paid, and all costs of suit.

The jurisdictional fact averred is, that the State has sought to impair the validity of a contract in violation of Article 1, Section 10 of the Constitution of United States.

Certain bonds and coupons were issued under an act of the Legislature of the State, approved January 24, 1874. That these bonds matured in forty years, and the interest, payable semi-annually at the rate of seven per cent per annum, was represented by coupons attached to the bonds.

In the year 1874 this act was recognized by a constitutional amendment, as follows:

"No. 1. The issue of consolidated bonds, authorized by the General Assembly of the State at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the tax therefor. To secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of such bonds shall be assessed and collected each and every year until such bonds shall be paid,

principal and interest, and the proceeds shall be paid by the treasurer of the State to the holder of said bonds as the principal and interest shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the treasury."

In 1879 another Constitution for the State was adopted, and among its provisions were the following:

"That the coupon of said consolidated bonds falling due the first of January, 1880, be, and the same is hereby, remitted, and any interest taxes collected to meet said coupons are hereby transferred to defray the expenses of the State government;" and further ordained by Act 257 of the Constitution (1879): "The Constitution of this State, adopted in 1868, and all amendments thereto, is declared to be superceded by this Constitution."

The State, through her Attorney General, excepted to the suit:

1. That the court was without jurisdiction *ratione personæ.*

2. Plaintiff cannot sue the State without her permission.

3. That the Constitution and the laws do not give the Circuit Court jurisdiction of a suit against the State.

This exception was sustained by the judge *a quo*, and from a judgment dismissing him he took writ of error from this honorable Court.

ARGUMENT.

Plaintiff will urge, following his argument before the Circuit Court, that the 11th amendment to the Constitution of the United States divests no other jurisdiction of suits *against* a State than when brought by a citizen of another State or of a foreign State, leaving the jurisdiction in all other cases unimpaired.

To this position is most respectfully opposed the opinion of Mr. Justice Bradley. 114 U. S. page 337.

In the dissenting opinion on the Virginia coupon cases, 114 U. S., Bradley, J., on page 337, says: "The Eleventh Amendment, it is true, does not prohibit the extension of the judicial power of the United States to suits prosecuted against a State by its own citizens. But the evident reason of this is, that the judicial power was not granted to the United States by the original constitution in such cases; hence, as it was not granted, it was not deemed necessary to prohibit it. It was evidently supposed that the control of all litigation against a State by its own citizens was in its own power, amongst that mass of rights which was reserved to the States and the people. It would be very strange to say that, although a State cannot, in any case, be sued by a citizen of another State since the adoption of the Eleventh Amendment, yet, in a case arising under the Constitution and laws of the United States, it may be sued by its own citizens. This would be

to deprive a State, with regard to its own citizens, of its sovereign rights of exemption from suit. It seems to us that the absurdity of this proposition is its sufficient answer. Unless the State chooses to allow itself to be sued, it cannot be sued; it has this prerogative, if no other. It is admitted, in point of form, that it cannot be sued by citizens of other States, or of foreign States, because of the Eleventh Amendment. The whole argument of the opinions of the majority of the court is directed to the object of showing that the State is not sued in the suits under consideration. We do not remember that it is anywhere contended that the State can be sued by its own citizens, against its own law, merely because the Eleventh Amendment does not in terms extend to that case."

In his concurring opinion in Antoni vs. Greenhow, 107 U. S., Matthews, J., on p. 783, says: "But for a breach of its contract by a State no remedy is provided by the Constitution of the United States against the State itself; and a suit to compel the officers of a State to do the acts which constitute a performance of its contract is a suit against the State itself. If the State furnishes a remedy by process against itself or its officers, that process may be pursued because it has consented to submit itself to that extent to the jurisdiction of the courts; but if it chooses to withdraw its consent by a repeal of all remedies, it is restored to the immunity from suit,

which belongs to it as a political community, responsible in that particular to no superior." Antoni was a citizen of Virginia.

Judge Billings, in his opinion, says:

In Louisiana vs. Jumel, Auditor, and Elliott vs. Wiltz, Treasurer of the State of Louisiana, and others, reported in 107 U. S. R., page 711, it was held by this court, and subsequently declared by the Supreme Court, that the suit was, in substance and effect, a suit against a State, and, therefore, that this court had no jurisdiction to hear or determine the same.

This suit is brought upon obligations similar in all respects to those involved in the Elliott case, i. e., issued under the same legislative and constitutional guaranties and impeded and defied by the same constitutional ordinance. There the plaintiff was a citizen of the State of New York. Here the plaintiff is a citizen of the State of Louisiana.

The greater includes the less. If a citizen of another State cannot sue, *a fortiori* a citizen of Louisiana cannot. The effect of the Eleventh Amendment of the Constitution was a construction by amendment of Sec. 2, Art. 3 of the Constitution, and so far as under that section it had been held that the judicial power included a suit between a State and citizens of another State, when the State was defendant that construction had been reversed. So far as relates to the class of cases to which this case belongs,

viz: where a State is sued by its own citizens, the Constitution had never included it, but had by implication excluded it.

I.

In Cohens vs. Va. 6 Wh. 405, in disposing of supposed cases where it would be impracticable for the courts to protect the constitution, such as the grant by a State of a patent of nobility, etc., the court says: The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to a case in law or equity in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. Pages 406 and 407.

In explaining the Eleventh Amendment, and saying that it was prompted by the fear that the States which were much involved would be sued by individual creditors, it says: "The amendment, therefore, extended to suits commenced or prosecuted by individual creditors, but not to those brought by States."

The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion.

A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation. 6 W. 407, 8, 9, 10.

The court holds that a suit against a State is a demand instituted, proceedings commenced and prosecuted by an individual, the institution and prosecution of which are prohibited by the amendment; but the prohibition did not apply to a proceeding instituted by a State against an individual, which did not change its character in any of its stages, the actor is still the same notwithstanding any change of title, etc. "It is clearly, in its commencement, the suit of a State against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the State, but for the purpose of a constitutional defense against a claim made by a State. * * * A writ of error, then, is in the nature of a suit or action when it is to restore the party who obtains it to the possession of anything which is withheld from him, not when its operation is entirely defensive." The court holds that where a suit is brought by a State, and defendant has the record brought before it by writ of error to pass upon the validity of his defense overruled by the

court below, for the purpose of ascertaining if the judgment violates the constitution or laws of the United States, the proceeding "can, with no propriety, we think, be denominated a suit, commenced or prosecuted against the State." "Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted." * * * Essentially it is an appeal on a single point, and the defendant who appeals from a judgment rendered against him is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment." And the court goes on to show that it is the same with the writ of error—different in form, but not in substance—only a means of defense, the mode of procedure by which the court exercises its appellate jurisdiction.

If the positive provision of Sec. 2, Art. 3, giving jurisdiction between States, does not give jurisdiction of a suit by a State on claims assigned to it, and against another State, as held in New Hampshire and New York vs. Louisiana, 108 U. S. 76, how could the general clause about suits under the constitution and laws be construed to give jurisdiction of a suit by a citizen against his own State. The court held that the constitution did not give jurisdiction of a suit brought by a State for its citizens. The suit must be for proper State purposes.

The jurisdiction of federal courts depends exclusively on the constitution and the terms of statutes

passed in pursuance thereof. Desty, Fed. Court, p. 211 (10). They are of limited jurisdiction and can exercise no jurisdiction which is not expressly granted or conferred by necessary implication. Id. (15). Their jurisdiction must be defined by Congress and cannot be enlarged or restricted by State laws. Id. (18.)

A statute permitting suits against the State is merely of grace, conferring no vested rights. And if, while a suit under it is pending, it is repealed, the jurisdiction of the court is gone, and it abates. Bishop on Stat. Cr. § 178 a.

"The general clause that 'the judicial power shall extend to all cases in law and equity arising under the Constitution of the United States' establishes the rule or boundary of jurisdiction so far as it depends upon the subject matter of the suit, but was not meant to change or affect the capacity or liability of parties to be sued. It, therefore, included all suits involving or arising under the Federal Constitution, brought by parties competent to sue against parties capable of being sued. It included all suits of a requisite character against parties so situated or constituted that they could be sued, whether brought by individuals or by the United States or one of the States or by a foreign government; but it had no effect to subject to the jurisdiction of the courts parties incapable to be sued.

"Indeed, it is to be observed that in the enumeration of the cases to which the judicial power extends,

Cons., Art. III, Sec. 2, while there is specified the cases 'between a State and citizens of another State and between a State and the citizens thereof and foreign States, citizens or subjects,' there is no mention of cases between a State and its own citizens.

"It is undoubtedly true that this enumeration of parties who could sue merely by virtue of their own character would not at all prevent the inclusion within the judicial power of other cases on account of the nature of the controversy. But when the jurisdiction is given merely by the character of the question involved it must be a suit in law or equity, that is a demand presented against a party defendant, who, according to its nature and relations to others, can be sued. According to the settled ideas relating to governments a State can no more be sued contrary to its continuing assent than can the dead. No matter what the nature of the controversy against the dead, human tribunals can take no cognizance of it. No more can they against a State against its will. The reason is that weightiest public reasons prevent that control over the treasury and resources of a State and the compulsory appropriation thereof to the extinction of its debts on the part of courts which the recovery of a judgment implies and necessitates. When the Constitution was adopted the effective enforcement of money judgments obtained in equity was by sequestration, and in law by the imprisonment of the debtor, which, of course,

would be inapplicable to the indebted States. Not more inconsistent with the functions of States, and indeed with their very existence or organisms for the protection of the lives and property and health of the citizens and their advancement by education, is any judicial control over the property of the States by bringing them directly before the courts.

"Though they do not make war or peace, nor regulate foreign or domestic commerce, nor deal with foreign governments, nor with each other through treaties, they still must, as sovereigns, regulate the taxation of the citizens, and must apply the taxes when levied to the repelling of pestilence, to the maintenance of schools and public order and the promotion of the rights of all its citizens in their persons and estates. Its taxes must be levied and its public lands disposed of by legislative will, for which a mandamus from the courts or a marshal's sale cannot be substituted." Opinion of Billings, J., Record, p. 8.

The Federal Courts never had jurisdiction over contests between States and its citizens. Cohen vs. Virginia, 6 Wharton, 402.

When it was decided in Chisholm vs. Georgia, 2 Dallas, 419, that under the Constitution a State could be sued by a citizen of another State, great irritation was produced, which led to the adoption of of the Eleventh Amendment. The efforts of the

States and of Congress were directed, by the means of that amendment, in the language of the Massachusetts Resolutions of September 27, 1793, to obtaining "such amendments in the Constitution of the United States as will remove any clause or articles of said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals, in any court of the United States." Ames vs. Kansas, 111 U. S., p. 66; N. Y. and N. H. vs. La., 108 U. S., p. 88.

In Cunningham vs. Macon and Brunswick R. R. Co., 109 U. S., on page 451, the court say: "It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution. This principle is conceded in all the cases." * * And on page 457: "No money decree can be rendered against the State, nor against its officers, nor any decree against the treasurer, as settled in *Louisiana vs. Jumel.* If any branch of the State government has power to give plaintiff any relief it is the legislative. Why is it not sued as a body, or its members by mandamus to compel them to provide means to pay the State's indorsement? The absurdity of

this proposition shows the impossibility of compelling a State to pay its debts by judicial process." Harlan, J., in his dissenting opinion, on page 467, admits "that no State can be sued as a party to the record, and no judgment rendered against it is as a party defendant."

When the New York Convention ratified the Constitution it declared, among other things: "That the judicial power of the United States, in cases in which a State may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a State." Elliot's Debates on the Federal Constitution, Vol. 1, p. 329.

In ratifying the Constitution the Rhode Island Convention proposed as one of twenty-one amendments:

"III. It is declared by the Convention that the judicial power of the United States, in cases in which a State may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a State; but, to remove all doubts or controversies respecting the same, that it be especially expressed as part of the Constitution of the United States that Congress shall not, directly or indirectly, either by themselves or through the judiciary interfere with any one of the States in the redemption of paper money already emitted and now in circulation, or in liquidating and discharging the public securities of any one State; that each and

every State shall have the exclusive right of making such laws and regulations for the before-mentioned purpose as they shall think proper." Vol. 1, p. 334.

Among all the objections urged by Luther Martin against the Constitution and its judiciary system (Vol. 1, pp. 344 to 389) in his letter to the House of Delegates of Maryland, in which he showed himself to be a particularly jealous of encroachments upon the States, particularly the small States, there is no intimation that he thought any individual could sue a State.

No such objection is to be found among those urged against the Constitution by any of its opponents in their reports to their respective Legislatures or Governors.

In replying to the general attack made upon the provisions in the Constitution for the federal judiciary in the Virginia Convention Mr. Madison, in Vol. 3, p. 533, said: "Its jurisdiction in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have, is that if a State should wish to bring a suit against a citizen" (of another State) "it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a State may have a claim, being dissatisfied with the State courts; * * * and if the State should con-

descend to be a party, this court may take cognizance of it." Vol. 3, p. 533.

John Marshall, in the Virginia Convention, said: Vol. 3, p. 419: "The State governments did not derive their powers from the general government. They retain all the powers not delegated."

In discussing the judiciary, page 555, he said: "With respect to disputes between *a State and the citizens of another State*, its jurisdiction has been decreed with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the Legislature of Virginia is a party, and yet the State is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable States to recover claims of individnals residing in other States. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a State cannot be defendant—if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State.

"It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account?

"If an individual has a just claim against any

particular State, is it to be presumed that on application to its Legislature he will not obtain satisfaction? But how could a State recover any claim from a citizen of another State, without the establishment of these tribunals."

Alexander Hamilton, in the Federalist LXXX, p. 364, says:

"It seems scarely to admit of controversy that the judiciary authority of the Union ought to extend to these several descriptions of cases; * * * and, lastly, to all those in which the State tribunals cannot be supposed to be impartial." (It is evident that Mr. H. thought this the reason why the jurisdiction of the United States courts was extended to controversies between a State and citizens of another State, Art. 3, Sec. 2, p. 473 of Fed.; it being the supposition that if a State sued the citizens of another State its own courts would be more apt to be partial and biased in its favor than would the federal courts.)

In contending that no harm could result to the States from such jurisdiction, he says:

"It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its

consent. This is the general sense and the general practice of mankind, and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty, were discussed in considering the articles of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint, but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretence to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State and to ascribe to the Federal Courts by mere implication and in destruction of a pre-existing right of the State governments a power which would involve such a consequence, would be altogether forced and unwarrantable."

In combatting the objection urged against the power of taxation, that it did or might encroach upon the powers of the States, Hamilton. p. 138, says: "The State governments, by their original constitutions, are invested with complete sovereignty;" and on pp. 139 and 140, he says: "I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this conclusion, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any articles or clause of its Constitution.

An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or

rather alienation, of State sovereignty would only exist in three cases." He then continues to demonstrate that the power of taxation in the States was equal to and concurrent with the same power in the Federal government. He says, on page 142: "It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty.

"The necessity of a concurrent jurisdiction in certain cases results from a division of the sovereign power and the rule that all authorities, of which the States are not explicitly divested in favor of the union, remain with them in full vigor, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution." On page 145 he says: "The individual States would, under the proposed constitution, retain an independent and uncontrollable authority to raise revenue, to any extent of which they may stand in need, by every kind of taxation, except articles on imports and exports."

Those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State, and that the judiciary of the State cannot interfere to enforce these contracts without the consent of the State, and the courts of the United States

are expressly prohibited from exercising such a jurisdiction. 20 Howard, 530.

In a suit brought to recover the proceeds of a captured ship (the "Active"), under sentence of a Court of Admiralty, the court says (C. J. Marshall):

"It is contended that the Federal Courts were deprived of jurisdiction in this cause by that amendment of the Constitution which exempts States from being sued in these courts by individuals. * * * The amendment simply provides that no suit shall be commenced or prosecuted against a State. The State cannot be made defendant in a suit brought by an individual." The Court held that the suit was not a suit brought against the State, but against individuals—being the entries of a former State treasurer, the money or certificates never having passed into the treasury. 5 Cranch, 139.

In Governor of Georgia vs. Madrazo, 1 Peters, 110, where Madrazo brought a libel against the Governor individually, an appeal taken from the decree of the District Court to the Circuit Court, and from the Circuit Court to the Supreme Court, and in the last court the point was made that it was really a suit against the State, the Supreme Court reversed the judgment and dismissed the suit on that ground.

In ex parte Ayers, 123 U. S., p. 443, the court says: "In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered

into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana vs. New Orleans*, 102 U. S. 203. That obligation, by virtue of the provision of Article 1, § 10, of the United States, cannot be impaired by any subsequent State legislation. Thus, not only the covenants and conditions ef the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the Eleventh Amendment to the Constitution, there being no remedy by suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion.

There will be found no dissent from the principles established by the authorities quoted:

In White vs. Greenhow, 114 U. S., p. 307.

Chaffin vs. Taylor, Id. 309.

Reyall vs. Virginia, 116 U. S. 572.

Davis vs. Gray, 16 Wallace, 203.

Railroad Co. vs. Tennessee, 101 U. S., 339.

jurisdiction was maintained because the suit was not by an individual against a State.

Quoting the language of the court in Poindexter vs. Greenhow, 114 U. S. 293: "Tried by every test which has been judicially suggested for the determination of the question, this case cannot be considered a suit against the State."

In the cases of Cohens vs. Virginia (6 Wheaton, p. 319,) and of Ames vs. Kansas (111 U. S. R., p. 470) the court held that when a State instituted a suit it necessarily submitted itself to all reviews in and transfers to the federal courts which the constitution and laws establishing the court authorized—i. e, that having voluntarily taken the position of suitor, the State had necessitated the enforcement of all legally established rules by which the rights of parties litigant were ascertained and adjudged, and these cases hold nothing more. The contest there was as to what followed in the progress of a cause where the character of a suitor had been voluntarily assumed by a State to enforce a demand or a proceeding. The contest here is altogether different, and is whether a State can compulsorily be made a suitor.

III.

The consent of the State must be a continuing consent. Permission to sue may be withdrawn. In ex parte Ayres, 123 U. S., p. 443, Mr. Justice Matthews says:

"Although the State may, at the inception of the contract, have consented to subject itself to suit it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional case. The very object and purpose of the Eleventh Amendment were to prevent the indignity

of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States invested with that large residium of sovereignty, which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, or that the course of their public policy and the administration of their public affairs should be subject to control by the mandates of judicial tribunals without their consent and in favor of individual interests."

Billings, J., finding no assent of the State to be sued, says in his opinion, speaking of the powers granted by the Constitution and the act of 1875, that neither includes a suit against a State, for the reason that it is impossible to be sued against its continuing assent, and where, as here, the object of the suit is the recovery of money, courts would be without any means of enforcing the judgment without an assumption of those powers which the checks and balances and distribution of powers in all well constituted govevernments—especially in the constitutional governments of the United States, are unchangeably and forever legislative, and not judicial.

It is not proposed to enter upon the question of sovereignty in the States; the question presented by this record is that a citizen of Louisiana seeks a judgment from the federal courts against his State

for a certain sum of money—based, it may be admitted, on a claim secured as a bonded obligation, nothing more nor less than alleged indebtedness due him by the State—and if such a judgment in such a case was possible, without any means for its enforcement or recognition.

Mr. Webster, in his letter to Baring, Brothers & Co., Vol. VI., Everitt's Ed., at page 539, says: The security for State loans is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments; the same basis, for example, as loans made by the United States under the authority of Congress—that is to say, the good faith of the government making the loan and its ability to fulfill its engagements.

"It has been said that the States cannot be sued on these bonds. But neither could the United States be sued, nor, as I suppose, the Crown of England. Nor would the power of suing give to the creditors, probably, any substantial additional security. The solemn obligation of a government arising on its own acknowledged bond would not be enhanced by a judgment rendered on such bond. If it either could not or would not make provision for paying the bond, it is probable that it could not or would not make provision for satisfying the judgment."

When the Legislature of Massachusetts protested

against the decision in Chisholm vs. Georgia, it was against a State being sued by any one. This was the utterance of the conventions of New York and Rhode Island when they voted for the adoption of the constitution. This was the meaning of the Eleventh Amendment. It introduced no new provision, but corrected what the people of three-fifths of the States thought was an erroneous construction. The reasons which prompted it and the arguments which secured it are equally strong against the citizen suing his own State, and against his suing any other State. In both cases the exemption springs from the inability of a court to deal directly with the treasury of a State.

It is asked that the judgment be affirmed.

WALTER H. ROGERS,

Atty-General State of Louisiana, for Defendant.

M. J. CUNNINGHAM,

Ex. Atty. Gen. of La. Of Counsel.